No. 79-972

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fiftn Circuit

MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

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MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

The Mead Corporation ("Mead"), through undersigned counsel, hereby moves for leave to intervene as a party petitioner to protect its interests and to preserve this Court's jurisdiction in Westvaco Corporation, et al. v. Adams Extract Company, et al., No. 79-972. Grounds for this motion are:

1. This Court granted the petition for certiorari of Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation"), and Georgia-Pacific Corporation ("Georgia-Pacific"), defendants in the Corrugated Container Antitrust Litigation, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution in antitrust cases.1/

2. Until September 3, 1980, Westvaco was the only defendant other than Mead which had not settled the class action cases which were consolidated in M.D.L. 310. Westvaco has now reached a settlement agreement with plaintiffs.2/ Mead is the only nonsettling defendant in the class action cases. On September 13, 1980, after a three-month trial, a jury returned an adverse verdict to Mead, although no final judgment has yet been entered. Plaintiffs claim that Mead, which has approximately a 2 1/2% market share, is nevertheless liable on the basis of industry wide sales. Thus, Mead is now the

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1/ On August 28, 1980, Mead filed a motion and brief as amicus curiae in support of petitioners.

2/ At the insistence of plaintiffs, Westvaco agreed as a condition of settlement to use its best efforts to dismiss the petition for certiorari granted by this Court in this appeal.

principal real party in interest on this appeal and is most directly affected by the contribution issue.3/

3. In the district court, petitioners filed motions to assert cross claims for contribution and an affirmative defense of claim reduction, the denial of which gave rise to this appeal. Mead, however, filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, The Mead Corporation v. Alton Box Board Co., Civil No. 4-79-245, alleging the same rights of contribution and claim reduction sought by petitioners. The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civil No. H-79-1436). Subsequently, plaintiffs filed a motion to dismiss which the district court granted on December 21, 1979. Thereafter, on January 2, 1980, Mead filed a motion for reconsideration, but the district court has never ruled on that motion. Accordingly, no final appealable order was entered by the district court from which Mead could appeal. But for the absence of a final appealable order, Mead would also be a petitioner on the appeal before this Court.

4. There is no question that Mead has standing to complain of the ruling by the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of petitioners' cross claims for contribution. The test as stated in Baker v. Carr, 369 U.S. 186, 204 (1962), is:

> Have the appellants such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

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3/ Neither petitioners nor Mead has settled the cases filed by plaintiffs which opted out of the class actions.

> sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions? This is the gist of the question of standing.

As the only nonsettling defendant in the class actions of M.D.L. 310, Mead unquestionably has a personal stake in the outcome of the controversy before this Court and has previously asserted its rights to contribution and claim reduction in M.D.L. 310.

5. Mead has always had a vital and legitimate interest in the appeal before this Court and now has the most interest. It should be permitted to intervene as a party petitioner to protect its interests and to preserve this Court's jurisdiction to decide this important issue under the federal antitrust laws. Mead submits that imperative reasons exist in this case for intervention: (a) Westvaco had been a defendant along with Mead in the trial of the class actions in M.D.L. 310, but after three months at trial it was announced in court on September 3, 1980 that Westvaco had reached a settlement agreement with plaintiffs; (b) Packaging Corporation and Georgia-Pacific had previously settled the class action cases; (c) Mead, as the only nonsettling defendant in the class action cases, has the paramount interest in the resolution of the issue on which this Court granted certiorari; (d) it is our understanding that respondents intend to move to dismiss the petition as moot; (e) Mead's interests would be severely prejudiced and may otherwise be lost unless intervention is permitted on this appeal. This Court has for far less compelling reasons in the past permitted intervention in cases already pending to persons who had not been parties to the proceedings below but who had a vital interest in the issue on which certiorari was granted. Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968); NLRB v. Acme Industrial Co., 384 U.S. 925 (1966); Rogers v. Paul, 382

U.S. 198 (1965); Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194 (1944); United States v. Terminal Railroad Association, 236 U.S. 194 (1915). In granting intervention, this Court in Mullaney v. Anderson, 342 U.S. 415, 417 (1952), stated:

> To grant the motion merely puts the [intervenor], the real party in interest, in the position of [petitioner]. The addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration. . . .

The interests of justice and judicial economy would best be served by permitting Mead to intervene.

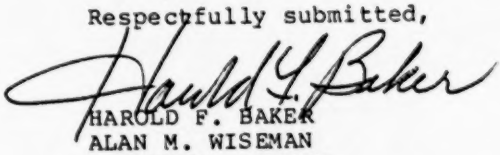
6. There is a concrete case and controversy, as required by Article III of the United States Constitution, between Mead and respondents concerning the precise issue on which this Court granted certiorari. Sosna v. Iowa, 419 U.S. 393, 402 (1975) (class action continues to be justiciable as to a named defendant who might still be affected by a judgment even though the case becomes moot as to some of the original parties); Bank of Marin v. England, 385 U.S. 99 (1966) (payment of joint judgment by one defendant did not render moot an appeal from that judgment by the other defendant where the question of contribution as between the two defendants remained unresolved).

7. The issue of contribution among antitrust defendants is likely to recur and is of widespread public importance to the fair and equitable administration of antitrust class actions. This Court has held that review is not mooted

when the "underlying question persists" or is "capable of repetition." Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 179 (1968); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). In M.D.L. 310, the individual opt-out actions are pending and raise the identical contribution issue. Furthermore, another petition for certiorari, also from the United States Court of Appeals for the Fifth Circuit, is pending in Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (1980), on the issue of rights of contribution and claim reduction. This Court has also held that a tentative settlement agreement reached between the parties after certiorari is granted does not moot an appeal. Coopers & Lybrand v. Livesay, 437 U.S. 464, 465 n.3 (1978). In M.D.L. 310, the settlements of the class actions by petitioners have not received final judicial approval and may not, if at all, for some time to come.

For the foregoing reasons, Mead moves the Court for leave to intervene as a party petitioner in this matter. If Mead's motion is granted, Mead adopts the arguments set forth in its motion and brief as amicus curiae, as well as those set forth in petitioners' briefs on the merits.

Respectfully submitted,



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